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No. 92-8894

In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

NEBRASKA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nebraska

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the Nebraska Supreme Court err in failing to apply the constitutional principles of *Cage v. Louisiana* to the Petitioner's case?

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OPINIONS BELOW

The Nebraska Supreme Court opinion, holding that the instruction given the jury on reasonable doubt was not constitutionally deficient under *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) is reported at *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993). The Nebraska Supreme Court denied petitioner's request for rehearing. (J.A. 43).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257, Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

The Nebraska Supreme Court denied Petitioner's motion for post-conviction relief on January 19, 1993. (J.A. 29). A timely petition for rehearing was denied on February 8, 1993. (J.A. 43). The petition for certiorari to this Court was filed June 1, 1993, and was granted September 28, 1993. (J.A. 44).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

Nebraska Revised Statute 28-303 reads today, in pertinent part, as it did at the time of Petitioner's trial:

> A person commits murder in the first degree if he kills another person (1) purposefully and with deliberate and premeditated malice . . .

NEB. REV. STAT. §28-303 (Reissue 1989).

Nebraska Revised Statute 28-304 reads today, in pertinent part, as it did at the time of Petitioner's trial:

> (1) A person commits a murder in the second degree if he causes the death of a person intentionally, but without premeditation.

NEB. REV. STAT. §28-304 (Reissue 1989).

Nebraska Revised Statute 28-305 reads today, in pertinent part, as it did at the time of Petitioner's trial:

> (1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another while in the commission of an unlawful act.

NEB. REV. STAT. §28-305 (Reissue 1989).

STATEMENT OF THE CASE

The question before the Court is whether the Nebraska Supreme Court improperly failed to apply *Cage v. Louisiana*, 498 U.S. 39 (1990), to the facts of Petitioner's case. Because Petitioner relied upon his constitutional right to have a jury determine issues of fact and guilt, the error here cannot be found harmless under any set of circumstances. *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993).

A. Course of Proceedings and Disposition Below

Petitioner Clarence Victor was convicted of First Degree Murder and sentenced to death. Petitioner's conviction and sentence were affirmed by the Nebraska Supreme Court. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990). Rehearing was denied on March 10, 1993. (J.A. 43).

Thereafter, Petitioner filed his Petition for Writ of Certiorari with this Court on November 16, 1990. Petitioner filed a Supplement to his Petition with this Court on January 15, 1991 specifically addressing this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990). *Cage* was decided on November 13, 1990. Petitioner's petition was denied on February 25, 1991. *Victor v. Nebraska*, 498 U.S. 1127 (1991).

Victor's initial Habeas Corpus action under the Nebraska Post Conviction Act raised the *Cage* issue anew. (J.A. 20). The trial court at this point improperly injected retroactivity into the case, and on that basis denied Petitioner's request for relief. (J.A. 26). The Nebraska Supreme Court affirmed on other grounds, holding its prior decision in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), was dispositive on the basis that NJI 14.08, (the instruction given in both cases), was distinguishable from the instruction held invalid under *Cage*. *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993); (J.A. 29).

B. The Trial Facts

At approximately 6:00 p.m. on Saturday, December 26, 1987, Omaha Police were dispatched to 2125 Ohio Street. (Tr. Vol. II 24). Upon arrival, the police officers entered the residence and found the deceased, Alyce

Singleton, lying on the floor in the kitchen area. (Tr. Vol. II 28) The deceased had lacerations to the neck among other injuries, and it was later determined that these lacerations were the major contributing factor to her death. (Tr. Vol. II 31).

In the canvas of the neighborhood, police learned from a neighbor that an older model cream-colored four-door automobile was parked west of Mrs. Singleton's residence at approximately 5:00 p.m. on December 26, 1987. (Tr. Vol. III 200). A black male described only as between the ages of 30 and 40, wearing sunglasses and a hat, was observed seated behind the steering wheel of the car. (Tr. Vol. I 6).

The police investigation revealed that an individual named Clarence Victor had previously done gardening work for the deceased. (Tr. Vol. II 113).

Victor was brought to the Omaha Police Station and was questioned about his whereabouts on December 26, 1987, the date of the homicide. Victor was not advised of his *Miranda* rights nor was he informed in any fashion that he was or was not under arrest. (Tr. Vol. III 243).

Victor was questioned by Officers Conahan and Foxall concerning the death of Mrs. Singleton and Victor initially gave them an exculpatory statement indicating that he had not been near the residence of the deceased on that date. (Tr. Vol. III 212).

After further investigation and advisement of his *Miranda* rights, Mr. Victor agreed to give a taped statement concerning his involvement with the homicide of Mrs. Singleton. At the trial, his taped statement was marked as Exhibit 28 and received into evidence over Victor's objection. (Tr. Vol. III 235).

In the taped statement, Victor acknowledged that he went to Mrs. Singleton's home on December 26, 1987, and knocked on the door. After opening the door, an argument ensued between the parties. Singleton began to scream at Victor and began to swing her hand and scratched Victor. Victor stated he struck her with his hand and knocked her down and then struck her in the head with a pipe. Victor stated that Mrs. Singleton, while on the ground, became tangled in some type of cord and he used his pocket knife to cut the cord loose from her throat. Victor indicated that at that point he left Mrs. Singleton's residence and returned home. (Tr. Vol. III 231-34); (Tr. Vol. VI Ex. 28).

When asked by Officer Foxall why he killed Mrs. Singleton, Victor responded that he drank too much. (Tr. Vol. III 252); (Tr. Vol. VI Ex. 28).

At trial, Dr. Blain Roffman, a pathologist, testified that he performed an autopsy on the body of Alyce Singleton. Dr. Roffman opined that the head injuries were caused by blunt trauma. He would only estimate that the trauma was caused by several blows to the head. (Tr. Vol. II 76). Finally, the cause of death was determined to have been caused by a "nick" of a branch of the left carotid artery with subsequent hemorrhaging. (Tr. Vol. II 78-81).

C. The Jury Argument

The most significant issue raised by defense counsel at trial was the existence, or lack thereof, of intent: purposefulness, deliberation, premeditation, and malice as required for conviction on the charge of first degree murder for the death of Alyce Singleton.

After summarizing the State's evidence, defense counsel argued at the conclusion of his opening statement

that the state would not be able to sustain its burden of proof concerning first degree murder.

> And from that in effect you will be asked to conclude beyond a reasonable doubt that the defendant premeditated the act and deliberated upon it before committing it.
>
> * * *
>
> What is important for you, as you all swore to do, is to listen to the evidence and not fill in the blanks, not lessen the burden of proof, and well and truly try the case.
>
> And I submit to you that the State, if you view this with an open mind and a clear conscience, will fall woefully short of proving to you beyond a reasonable doubt first degree murder in this case.

(Tr. Vol. II 21-22).

Clarence Victor did not testify. As defense counsel indicated at the outset of the trial, the thrust of his case would be the inability of the State to prove "sufficient criminal intent for first degree murder." (Tr. Vol. II 15-16). This failure, defense counsel argued, would make the difference between proof of first or second degree murder or manslaughter. The difference between life or death.

There was reasonable doubt concerning the existence of the intent required for first degree murder: purposefulness, deliberation, premeditation and malice.

Victor had on two occasions given exculpatory statements to police officers and had indicated that he had been home between the hours of 4:00 and 6:00, the approximate time of the murder. (Tr. Vol. III 212).

Mr. Victor's brother-in-law testified that to his recollection Victor was not home during this period of time, but that he returned home shortly thereafter, was

extremely upset, and indicated that someone had killed Mrs. Singleton. (Tr. Vol. II 157). Walker also described Victor's drinking habits as being drunk on an average of once to twice a week. (Tr. Vol. II 163). Walker testified that Victor was drunk on Christmas day, the day before the murder, and further testified that his wife had become involved in an argument with Victor regarding his drinking habits. (Tr. Vol. II 164). It was this argument that led Walker to inform Victor that he was no longer welcome at the home of Walker and his wife and would have to move out. Victor was in the process of moving out that same day, the day of the murder. (Tr. Vol. II 165).

Victor's former girlfriend, Adelle Doyle, testified that on the morning of the murder Victor had stopped by her home and that she could tell Victor had already consumed "a couple of beers." (Tr. Vol. III 182). She also indicated that Victor probably had something to drink while he was at her house. (Tr. Vol. III 191-92). Doyle testified that on that same day, Victor called her "later that evening", was "hysterical" and after Doyle had told Victor to calm down, Victor informed Doyle that "Mr. Voyal's sister [Alyce Singleton] had been killed." (Tr. Vol. III 186).

Pitmon Foxall, one of the chief officers involved in the Singleton homicide investigation, testified that Victor had indicated to him that on the morning of the murder Victor had picked up his girlfriend at a bar, went driving around, stopped at a grocery store to pick up beer and continued to drive around, consuming the beer. (Tr. Vol. III 211-12).

In closing arguments, defense counsel honed the issue even further.

> The issues in this case relate solely, realistically and only to the intent for the Defendant. And I use the term intent in its generally understood meaning not its legal terms. What we are talking about is what was going through defendant's mind. That's the issue because, folks, the difference between first, second and manslaughter is what was going through the mind of the perpetrator of the crime. You all agree that the State had the obligation to prove to you beyond a reasonable doubt the elements that are required before you would convict on any offense.

(Tr. Vol. III 294-95).

D. The Jury Instructions

Following the closing arguments, the court instructed the jury on first degree murder, second degree murder and manslaughter and the material elements of each crime. (J.A. 2). The jury was admonished that if the State failed to prove beyond a reasonable doubt "any one or more" of the material elements of the respective crimes it was the jury's duty to find Victor not guilty of the particular crime. (J.A. 3-5).

The trial court gave the following instruction:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you after full, fair and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of

> the truth of a fact beyond reasonable doubt and yet to be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

(J.A. 11).

The jury returned a verdict of guilty of Murder in the First Degree.

Pursuant to NEB. REV. STAT. §29-2520 (Reissue 1985), a sentencing hearing was held before a three judge panel on August 26, 1988. The Sentencing Panel sentenced Victor to death.

Victor appealed his conviction and sentence to the Nebraska Supreme Court. That court affirmed both the conviction and the sentence. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990).

E. Victor's Post-Conviction Appeal

Victor filed a Motion for Post-Conviction Relief with the Douglas County District Court pursuant to NEB. REV. STAT. §29-3001 (et seq.) (Reissue 1989). The Motion was filed on May 10, 1991. (J.A. 20).

Petitioner's motion was his first habeas corpus proceeding at the trial level under the Nebraska Post-Conviction Act (NEB. REV. STAT. §29-3001, et seq.). Specifically, the relevant issue raised was as follows:

> 4. The Defendant was denied due process of law in violation of the Fifth and Fourteenth Amendment [sic] of the U.S. Constitution and Art. I Sec. 3 of the Nebraska Constitution in that the trial court improperly instructed the jury on the law with regard to the concept of "Reasonable Doubt."

(J.A. 21)

After quoting the challenged instruction, the Motion went on to argue:

> This instruction is taken from NJI 14.08. The United States Supreme Court has recently held that a similar instruction violates due process of law. See *Cage v. Louisiana* 48 CrL 3062, ___ U.S. ___, ___ Spr. Ct. ___ (1990) [sic].
>
> Since the primary defense asserted at trial by Defendant was that the state had insufficient evidence to prove the elements of premeditation and deliberation beyond a reasonable doubt, the Defendant was prejudiced by the courts [sic] instruction to the jury of this constitutionally infirm definition of reasonable doubt.

(J.A. 21-22).

The trial court denied relief, holding as follows:

> Defendant contends that his constitutional rights were violated in that the Court utilized the instruction on reasonable doubt that is provided in NJI 14.08, which has been extensively utilized and has been approved by the Nebraska Supreme Court. Defendant contends that in *Cage v. Louisiana*, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed. 2d 339 (1990), the Court held that such an instruction violates due process of law. The decision in *Cage* was rendered after defendant's conviction and affirmance of such conviction on appeal to the Nebraska Supreme Court. *Cage* does not indicate if its effect is retroactive. The

> Court determines that it should not be applied retroactively. *See Kernes v. Grammer*, 227 Neb. 165, 416 N.W.2d 253 (1987); *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984); *Teague v. Lane*, 489 U.S. 288.
>
> * * *
>
> IT IS FURTHER ORDERED that defendant's motion to vacate sentence and conviction be and the same is hereby overruled.

(J.A. 26, 28).

Petitioner appealed the above decision to the Nebraska Supreme Court on November 3, 1991 and included the *Cage* issue as claimed error. The Nebraska Supreme Court held as follows:

> Relying on the U.S. Supreme Court's decision in *Cage v. Louisiana*, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), defendant further argues that the jury instruction on reasonable doubt was unconstitutional in that it confused the jury and suggested a higher degree of doubt than is required under the 14th Amendment. Subsequent to Defendant's trial and appeal, this court has had the opportunity to review the constitutionality of a jury instruction identical to the one challenged here. See *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). In *Morley*, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional the U.S. Supreme Court in *Cage*.
>
> * * *
>
> . . . Victor's assigned error addressing the reasonable doubt instruction was decided by our opinion in *State v. Morley, supra*, and is consequently without merit.

(J.A. 35-36); *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993).

Following the Nebraska Supreme Court's affirmance on January 29, 1993 of the District Court's order, Victor thereafter timely filed his Motion for Rehearing on February 8, 1993. On March 10, 1993, the Nebraska Supreme Court overruled the Motion. (J.A. 43).

Victor filed his Petition for Writ of Certiorari to this Court on June 1, 1993. On September 28, 1993 this Court granted the Writ of Certiorari with respect to question III, "Whether the Nebraska Supreme Court erred in failing to reverse the trial court's refusal to retroactively apply *Cage v. Louisiana*."

This case is consolidated with No. 92-9049, *Sandoval v. California*.

SUMMARY OF ARGUMENT

As noted by the Court most recently in *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993), a jury instruction that misdescribes the states burden of proof cannot be subject to a harmless error analysis. This Court has long since recognized the State's burden in all criminal prosecutions to prove every element of the offense charged "beyond a reasonable doubt". *In Re Winship*, 397 U.S. 358 (1970).

In the present action, factual guilt is not in question. It was conceded by defense counsel at trial in closing argument. However, the issue of whether or not Clarence Victor possessed the requisite criminal elements of intent for first degree murder: purpose, premeditation, deliberation and malice, was not conceded. Indeed the focal point of the entire trial before the jury was whether Clarence Victor had the requisite criminal intent-premeditation,

malice, deliberation, beyond a reasonable doubt, to convict him on a charge of first degree murder.

The absence of the factual guilt as an issue at trial in no measure lessened the State's burden of proof. The jury, not the trial court or the State, was charged with the task of determining Victor's guilt of the three offenses for which the court instructed them, first degree murder, second degree murder or manslaughter.

As noted by this Court recently, the ultimate measure of whether or not the jury's fact-finding standards pass constitutional scrutiny cannot be the subject of judicial factfinding, and certainly not under a harmless error analysis. *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993).

Where, as in Sullivan and the present action, a reasonable doubt instruction contains defects which create a "reasonable likelihood" that the jury will misapply the State's burden of proof, a jury is precluded from fulfilling its truth-finding task on the standard of proof beyond a reasonable doubt. *Boyde v. California*, 494 U.S. 370 (1990).

The unwillingness of the Nebraska Supreme Court to recognize this Court's admonitions concerning the structural defects of a nearly identical reasonable doubt instruction requires this Court to revisit *Cage v. Louisiana*, 498 U.S. 39 (1990) and *Sullivan, supra*. But the problem with the Nebraska high court is a more fundamental one. The opinion by the Nebraska Supreme Court on the relevant issue for which Certiorari was granted did not focus its attention to a harmless error analysis of the jury's fact-finding abilities in light of Cage. Rather, the court focused its attention upon its own prior decision in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991).

The United States District Court for the District of Nebraska has since held what this Court already knows:

such a position is untenable. *Morley v. Stenberg*, 828 F.Supp. 1413 (D.Neb. 1993). The local federal court recognized the same defect found by this Court to exist in Cage and *Sullivan*:

> I therefore conclude that, in attempting to define the concept of reasonable doubt, the challenged instruction so misstated the degree of certainty required to convict, and the degree of doubt required to acquit, that it is reasonably likely the jury applied the instruction in a way that violated the constitution by lowering the government's burden of proof.

Morley v. Stenberg, 828 F.Supp. 1413, 1425 (1993). The instruction at issue in *Morley, supra*, is identical to the instruction given at Petitioner's trial.

The difficulties of the Nebraska instruction are at least threefold. First of all equating "actual and substantial doubt" with reasonable doubt unconstitutionally overstates the degree of doubt required for acquittal. *Morley v. Stenberg*, at 1418.

Secondly, the usage of the term "strong probabilities of the case" implies the allowance of a finding of guilt upon something more closely akin to the civil "preponderance of the evidence" standard, thus relieving the jury of the constitutionally essential beyond a reasonable doubt standard of proof. *See Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Finally, and as recognized by *Cage*, usage of the term "moral certainty" in a reasonable doubt instruction and equating that term with "reasonable doubt", allows the jury to find guilt on feeling or convictions in spite of, or worse, independent of the evidence presented. *Cage v. Louisiana, supra*, at 41.

Cage, Sullivan, Boyde and *Francis* tell us that the reasonable doubt instruction utilized at Petitioner's trial is unconstitutionally defective. *Sullivan* tells us that an unconstitutionally defective reasonable doubt instruction is that type of structural defect that renders a trial in which it was given so deficient in its guarantee of due process to a criminal defendant that it cannot be considered harmless error under any set of circumstances.

Petitioner asks the Court to remand this matter for a new trial consistent with its opinion in *Sullivan v. Louisiana*.

ARGUMENT

The Sixth Amendment to the United States Constitution provides every criminal defendant with a right to a trial by a jury of his peers. Intertwined with this Sixth Amendment right to a trial by jury are the Fifth and Fourteenth Amendment rights to due process of law. This Court in the case of *In Re Winship*, 397 U.S. 358 (1970) held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. When a jury instruction allows a jury to convict a person on proof of guilt that is less than a reasonable doubt, that person has not received due process of law. In Clarence Victor's case, a conviction on a constitutionally deficient jury instruction condemned him to death without being afforded due process.

This Court held in *Cage v. Louisiana*, 498 U.S. 39 (1990), that a Louisiana reasonable doubt instruction violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by allowing

conviction in a criminal case on proof that could potentially fall below the beyond a reasonable doubt standard. The instruction at issue in the Petitioner's case is as constitutionally defective, if not more constitutionally defective, as the instruction in *Cage* and constitutes plain error.

In *Cage* this Court declared invalid on Due Process grounds a jury instruction defining reasonable doubt as follows:

> "one founded upon a real tangible and substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty."*

State v. Cage, 554 So.2d 39, 41 (La. 1989) (emphasis added).

In Clarence Victor's case, the Nebraska trial court instructed the jury using Nebraska Jury Instruction 14.08 which defined reasonable doubt as follows:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair and impartial consideration of all the evidence, to have an abiding conviction, to a *moral certainty,* of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be

> convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. *You may find an accused guilty upon the strong probabilities of the case,* provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. *A reasonable doubt is an actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

(J.A. 11); (Emphasis added).

A comparison of the instruction declared unconstitutional in *Cage* and the instruction given in Victor's case reveals that both jury instructions are unconstitutional as they are both susceptible to interpretation as requiring a level of proof less than beyond a reasonable doubt in order to find the criminal defendant guilty.

Petitioner therefore respectfully requests that this court vacate his sentence and remand the case for a new trial.

I. THE JURY INSTRUCTION IN THIS CASE IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW.

The proper standard used in deciding whether or not a jury instruction is defective is the "reasonable likelihood" standard as developed and defined by this Court in *Boyde v. California,* 494 U.S. 370 (1990). The standard is whether there is a "reasonable likelihood" that the jury applied the challenged instruction in a way that violated Petitioner's constitutional rights. This standard was reaffirmed in *Estelle v. McGuire,* 112 S.Ct. 475, 482 n.4 (1991)

where this Court denounced the *Cage* "how the jurors could have understood the charge as a whole" standard, and with one voice proclaimed that the "reasonable likelihood" standard is the correct standard to be used when reviewing jury instructions.

Accordingly, applying *Boyde,* the language used in instructing the jury on the concept of reasonable doubt in the Petitioner's case rises to the level of creating a "reasonable likelihood" that they could find guilt based upon something less than beyond a reasonable doubt.[1]

However, the language of the jury instruction in this case is so clearly flawed and so close to that in *Cage* that it fails under any standard of review. Therefore there is no need here to revisit this issue, or to further refine the application of the review standard adopted by the Court in Estelle in this different constitutional context.

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[1] In the case of *Francis v. Franklin,* 471 U.S. 307 (1985), this Court held that the correct analysis for determining the constitutionality of a challenged jury instruction was, how "a reasonable juror could have interpreted the instruction." *Id.* at 1971 (citing *Sandstrom v. Montana,* 442 U.S. 510, 514 (1979)). There is a school of thought within the legal community that believes the *Franklin/Sandstrom* standard of review for jury instructions still exists, even in light of this Court's opinion in *Estelle v. McGuire.* It is worth noting that the reasonable doubt instruction given in the case at bar is also violative of Petitioner's constitutional rights under that standard.

II. THE REASONABLE DOUBT INSTRUCTION USED IN THE PETITIONER'S CASE VIOLATED DUE PROCESS BY ALLOWING CONVICTION ON A STANDARD OF LESS THAN A REASONABLE DOUBT.

This Court made it clear in *In Re Winship* that a criminal defendant must be found guilty beyond a reasonable doubt to be convicted of a crime.

> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charge.

Winship, 397 U.S. at 363. The jury instruction in the Petitioner's case creates a reasonable likelihood that the jury found Petitioner guilty of first degree murder by employing a standard below that of "beyond a reasonable doubt."

A. "Actual & Substantial Doubt"

Like the jury instruction found unconstitutional by this Court in *Cage,* the instruction in the Petitioner's case equates reasonable doubt with "actual and substantial doubt." The commonly understood meaning of the term "substantial" suggests a degree of doubt necessary to acquit that is higher than the degree of doubt required under the reasonable doubt standard. *Cage,* 498 U.S. at 41. There is certainly a reasonable likelihood that an ordinary jury attempting to apply the correct reasonable doubt standard applied the common meaning of the term "substantial." The instruction therefore violated Petitioner's

due process rights in allowing conviction for first degree murder on proof less than beyond a reasonable doubt.

Several Federal courts prior to the decision in *Cage* had found the usage of the "substantial doubt" language problematic, some going so far as to state that the usage of such language should result in reversal of the decision of the trial court. *See Monk v. Zelez*, 901 F.2d 885, 889 (10th Cir. 1990) (granting habeas relief where jury instruction defined reasonable doubt as "substantial, honest, conscientious doubt," noting that appellate courts "have uniformly criticized and rejected jury instructions equating reasonable doubt with substantial doubt"); *United States v. Wright*, 542 F.2d 975, 988 (7th Cir. 1976) (warning that any court using substantial doubt language in a jury instruction "can reasonably expect a reversal"), cert. denied, 429 U.S. 1073 (1977), overruled on other grounds, *United States v. Hollinger*, 553 F.2d 535 (7th Cir. 1977); *United States v. Atkins*, 487 F.2d. at 260 (concluding "substantial doubt" is not synonymous with "reasonable doubt" and disapproving of instructions relating the two); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1972) (granting a new trial where the jury instruction defined reasonable doubt as "a very substantial doubt").

Since the *Cage* decision, at least two Federal Courts have found that the usage of the terminology "actual and substantial doubt" in the context of a reasonable doubt instruction is violative of due process under *Cage*. The Fourth Circuit Court of Appeals in *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992), found a jury instruction equating reasonable doubt with "substantial doubt" to be violative of due process under *Cage*. More recently, the United States District Court for the District of Nebraska, found the jury instruction given in Nebraska utilizing

"actual and substantial doubt" language to define reasonable doubt, the same instruction given in Petitioner's case, to be violative of an accused's due process rights under *Cage*. *Morley v. Stenberg*, 828 F.Supp. 1413 (D.Neb. 1993).

> [E]quating reasonable doubt with "actual and substantial" doubt is improper and potentially misleading in that it overstates the degree of doubt required for acquittal under the reasonable doubt standard.

Morley v. Stenberg, 828 F.Supp. at 1418.

Perhaps the best illustration of the divergence in meaning between "actual and substantial" doubt and reasonable doubt comes from an Eighth Circuit case disapproving of "substantial doubt" language. In *United States v. Atkins*, 487 F.2d 257, 260 n.2 (8th Cir. 1973), it was pointed out at oral argument that if someone had to undergo major surgery and were asking the doctor's opinion as to the prospects for a successful outcome, the person would feel quite differently if the doctor told him there was only a reasonable chance of success as opposed to being told there was a substantial chance of success. *Atkins* at 260 n.2 (quoting *State v. Davis*, 482 S.W.2d 486, 490 (Mo. 1972)).

Clearly the common understanding of the meaning of "substantial" is different than the understood meaning of "reasonable." "Substantial doubt" so overstates the degree of doubt required by *In Re Winship* that Petitioner's due process rights were violated when the jury was instructed in a manner suggesting the terms were synonymous.

B. "Strong Probabilities"

The jury instruction given in Clarence Victor's case allowing the jury to find the Petitioner guilty of first degree murder on the "strong probabilities of the case" allows a finding of guilt on a standard of proof well below that of beyond a reasonable doubt. Although this language does not appear in the *Cage* instruction, the language suffers from the same constitutional infirmities. *See Morley v. Stenberg*, 828 F.Supp. at 1421-22.

Cage requires that when determining whether a jury instruction accurately sets forth the proper standard of proof, terms are to be given their common meaning. *Cage* at 41. The common meaning of the term "probabilities" more accurately describes the civil "preponderance of the evidence" standard than it does the criminal "beyond a reasonable doubt" standard.

Webster's Ninth New Collegiate Dictionary (1983) defines the word probability as being, "[t]he quality of being probable." The definition of probable reads, "supported by evidence strong enough to establish presumption *but not proof.*" (Emphasis added). Accepting a common dictionary definition to accurately portray the general public's understanding of the term, this phrase cannot be said to accurately define the reasonable doubt standard.

In Re Winship requires a conviction in a criminal case to be based upon proof beyond a reasonable doubt of the defendant's guilt. Nowhere has this Court or any other court accepted a proposition allowing conviction in a criminal case on the prosecution's creation of a presumption of guilt rather than proof of guilt. Rather in our accusatorial system of justice a person is presumed innocent until proven guilty. However, in instructing the jury

that they may find a defendant guilty upon the "strong probabilities" of the case, the trial court in effect advocates conviction upon the prosecution's creation of a presumption of guilt on the part of the defendant. The State used this crutch in Victor's trial to get to a conviction on first degree murder charge. This unconstitutionally relieves the State's burden of proof of every material element of a charge by allowing a conviction on proof by something less than beyond a reasonable doubt. *See Francis v. Franklin*, 471 U.S. 307, 314 (1985) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979)).

Black's Law Dictionary, 5th ed. (1979) provides a similar definition of the word "probability", further demonstrating the deficiencies inherent in using the terminology to define the reasonable doubt standard. Black's defines "probability" as,

> Likelihood; appearance of reality or truth; reasonable ground of presumption; verisimilitude; The likelihood of a proposition or hypothesis being true, from its conformity to reason or experience, or from superior evidence or arguments adduced in its favor. A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

This definition of "probability" purported to be accepted by the legal community similarly does not accurately reflect proper language defining the reasonable doubt standard. In fact, the language more accurately describes the "preponderance of the evidence" standard used in civil cases. Preponderance of the evidence is defined by Black's as,

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a

> whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary, 5th ed. (1979) (citing *Braud v. Kinchen*, 310 So.2d 657 (La. 1st Cir. 1975)). *In Re Winship* clearly states this is not the proper standard for a finding of guilt in a criminal case.

Further evidence of the inadequacies of the "strong probabilities" language may be found by looking to some of the synonyms for the term "probable" as suggested in Webster's Collegiate Thesaurus (1976): "conceivable," "likely," "possible," "believable," "colorable," "credible" and "plausible." This language clearly does not reflect the standard of proof in a criminal case held out as fundamental in the American justice system. In our system a criminal is not to be convicted and sentenced to death because he is conceivably guilty, possibly guilty, or plausibly guilty. He is either guilty beyond a reasonable doubt or he is not guilty at all.

The addition by the Court of the word "strong" as a modifier of the term "probabilities" does not save the language from suggesting a degree of certainty lower than that required by due process. A strong probability is at most something more than a probability[2] – something still far short of what is constitutionally required to establish criminal guilt. Such an instruction simply does not properly impress upon the jury the "necessity of reaching a subjective state of certitude of the facts in issue." *Winship* at 364.

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[2] Cf. *Maynard v. Cartwright*, 486 U.S. 356, 364 (1987)("especially heinous merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means. . . . ")

It is "reasonably likely" that the jury would understand the phrase as allowing the finding of guilt relating to the charge of first degree murder on proof that is less than beyond a reasonable doubt. Under the *Estelle v. McGuire* and *Boyde v. California* standard, the reasonable likelihood of misinterpretation of the reasonable doubt instruction by the jury condemns the charge as violative of the Due Process Clause. *Cage v. Louisiana* at 41.

C. "Moral Certainty"[3]

In *Cage*, this court warned that it is improper to equate guilt beyond a reasonable doubt with "moral certainty" of guilt, because doing so allows jurors to find a defendant guilty based upon "moral certainty" rather than upon "evidentiary certainty." *Cage* at 41. Like the instruction in *Cage*, the Nebraska Courts improperly provided the jury with a definition of reasonable doubt equating beyond a reasonable doubt with "moral certainty."

The Nebraska Supreme Court attempted to artfully distinguish NJI 14.08 from the instruction given in *Cage*. The distinction offered by the Nebraska Supreme Court suggested that the *Cage* instruction required the juror to vote for conviction unless convinced to a moral certainty that there exists reasonable doubt, while the Nebraska instruction required a juror to vote for acquittal unless

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[3] The brief of the Petitioner in *Sandoval v. California*, 92-9049, with which this case is joined, provides a helpful survey of the history of the phrase "moral certainty" and the meaning given that phrase in modern American usage. Rather than repeat those arguments here, Petitioner respectfully refers the Court to them and incorporates them by this reference.

convinced to a moral certainty that no reasonable doubt exists. The United States District Court for the District of Nebraska found the distinction to be untenable in *Morley v. Stenberg*. Magistrate Piester noted his dissatisfaction with the Nebraska Supreme Court's analysis:

> I do not believe a reasonable juror reading the language of the challenged instruction would engage in the mental gymnastics required to interpret the instruction to mean they should acquit the defendant "unless convinced to a moral certainty that no reasonable doubt exists."

Morley v. Stenberg, 828 F. Supp. at 1421 n.10.

What is moral certainty? On it's face this charge suggests that the jurors should rely on their feelings about the crime rather than the evidence. When the defendant is alleged to have committed an especially repugnant crime a juror can reasonably believe the reasonable doubt instruction equating "moral certainty" with evidentiary certainty allowing a verdict to be based upon moral standards and considerations in addition to or instead of evidentiary standards.

Because the jury instruction in the Petitioner's case equates "moral certainty" with the requirement of finding guilt beyond a reasonable doubt, the use of the terminology is improper and creates a reasonable likelihood of misleading the jurors in their determinations of the defendant's guilt. *See Cage* at 41. *See also Lanigan v. Maloney*, 853 F.2d 40 (1st Cir. 1988) (affirming habeas relief where a jury instruction equated proof beyond a reasonable doubt with "moral certainty" and created a significant risk that jurors could find guilt based on a lower standard of proof than required by due process), cert. denied, 488 U.S. 1007 (1989); *United States v. Drake*, 673 F.2d 15, 20 (1st Cir. 1982) (strongly disapproving of jury

instructions using "moral certainty" to define proof beyond a reasonable doubt because the juries might feel justified in convicting on a feeling rather than on factual evidence).

III. UNDER *SULLIVAN v. LOUISIANA*, A JURY INSTRUCTION THAT DEFINES REASONABLE DOUBT IN A MANNER SUGGESTING A LOWER DEGREE OF PROOF NECESSARY TO CONVICT IS NOT HARMLESS ERROR.

As concluded by this Court in *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993), a jury instruction that misdescribes the requisite burden of proof in a criminal case is not subject to harmless error analysis. The guarantee of a right to a jury verdict of guilt beyond a reasonable doubt is denied by an improper instruction and therefore that type of an error constitutes a structural defect in the trial mechanism that defies analysis by harmless error standards. *Sullivan v. Louisiana* at 190-191.

IV. THE NEBRASKA SUPREME COURT ERRED IN FAILING TO FOLLOW THE CONSTITUTIONAL PRINCIPLES OF *CAGE v. LOUISIANA* IN THIS CASE.

The State District Court below improperly injected the issue of retroactivity into this case. The Court noted:

> The decision in *Cage* was rendered after Defendant's conviction and affirmance of conviction on appeal to the Nebraska Supreme Court. *Cage* does not indicate if its effect is retroactive. The Court determines that it should not be applied retroactively.

However, this Court has made it clear that a case is final, for retroactivity purposes, when a petition for certiorari is

denied. *See Stringer v. Black*, 112 S.Ct. 1130, 1134 (1992); *Sawyer v. Smith*, 110 S.Ct. 2822, 2826 (1990). All constitutional rules, whether "new" or otherwise, apply equally to cases which have not reached that point at the time the rule is announced or applied by this Court in another case. *Griffith v. Kentucky*, 479 U.S. 314 (1987). The jurisprudential rule of *Griffith* – which reflects "basic norms of constitutional adjudication," *Id.* at 322, was not changed by, but ratified in, *Teague v. Lane*, 489 U.S. 288 (1989). *See Id.* at 304 (plurality opinion).

Since Petitioner's case was pending on certiorari when *Cage v. Louisiana* was decided, in fact the *Cage* issue was raised by counsel in a supplement to his pending certiorari petition, *Griffith* and *Teague* require that Petitioner's case be decided under the same constitutional principles as *Cage*. The Nebraska Supreme Court therefore erred in failing to follow *Cage* in this case.[4]

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[4] Even if retroactivity were an issue in this case, under *Teague v. Lane*, 489 U.S. 288 (1989), *Cage* should be retroactively applied to the Petitioner's case. In Teague this Court set forth an exception to the general rule that new rules of constitutional criminal procedure will not be applicable to those cases which have become final before new rules are announced. This exception states that a new rule should be applied if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'." *Teague* at 311 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

> The concept of guilt beyond a reasonable doubt provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

In Re Winship at 363 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1985)). Fundamental fairness in a criminal trial cannot be said to exist without the adherence to the standard of proof beyond a reasonable doubt. Therefore, under the above-noted exception to the general principle against retroactive application of new constitutional procedural rules, *Cage* should be applied retroactively when a proper case so requires. Even if retroactivity were a valid issue, the fundamental nature of the reasonable doubt instruction in the scheme of constitutional due process rights would require *Cage* to be applied to Petitioner's case.

CONCLUSION

In the American system of justice, fact-finding must be done pursuant to the only constitutionally acceptable standard for finding facts in criminal cases, the standard of proof beyond a reasonable doubt. *In Re Winship* at 362. Clarence Victor was denied his rights to due process of law when the judge issued a jury instruction using such dubious terms as "substantial doubt," "strong probabilities," and "moral certainty" to define the reasonable doubt standard, thereby creating a reasonable likelihood that the jurors in his trial applied the instruction as to find him guilty on the charge of first degree murder through a standard below that of beyond a reasonable doubt. The effect of such a constitutionally deficient reasonable doubt instruction in Clarence Victor's case was disastrous. Without it the State could not have obtained a guilty verdict on the first degree murder charge. And consequently Clarence Victor could not have been sentenced to death.

This error at the trial level is not subject to harmless error analysis. The standard of proof beyond a reasonable doubt is in keeping with the acknowledgement that "there is always in litigation a margin of error," and a determination that where life and liberty are at stake, the risks of error must be cast in a way that protects the

"transcending value that an accused has in his liberty." *In Re Winship* at 364.

Because the Petitioner was found guilty of first degree murder and sentenced to death on a finding of guilt based on a standard less than proof beyond a reasonable doubt, Petitioner was denied his constitutional right to due process of law, and in effect a trial by jury. Petitioner therefore asks that his rights be vindicated by vacating his sentence and ordering a new trial consistent with this Court's decisions in *Cage v. Louisiana* and *Sullivan v. Louisiana*.

Respectfully Submit'ed,

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